APPENDIX A

App. 1

In the

United States Court of Appeals

For the Seventh Circuit

No. 93-3207

WILLIAM HOPE,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 92 C 6654 & 88 CR 298—George M. Marovich, *Judge.*

ARGUED SEPTEMBER 8, 1994—DECIDED DECEMBER 23, 1994

Before WELLFORD,* MANION, and KANNE,
Circuit Judges.

KANNE, *Circuit Judge.* A federal district court jury convicted William Hope of unlawfully possessing a firearm as a convicted felon. The district judge sentenced Hope to thirty years imprisonment after finding that he had three prior violent felony convictions; we upheld Hope's conviction and sentence on direct appeal. *United States v. Hope*, 906 F.2d 254 (7th Cir. 1990), *cert. denied*, 499 U.S. 983, 111 S.Ct. 1640 (1991).

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* The Honorable Harry W. Wellford of the Sixth Circuit, sitting by designation.

Hope then attacked his sentence collaterally by way of a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255. He alleged in his motion that his attorneys at various stages of his criminal justice experiences have been constitutionally ineffective. The district court denied his motion on April 27, 1993. On May 4 and May 21, 1993, Hope filed motions to extend the time to file a "Motion For Reconsideration" with the district court. The government did not object to either motion and the district court granted both through minute orders. On June 14, 1993, Hope filed a Motion For Reconsideration with the district court, seeking review of its denial of his § 2255 petition. The district court denied Hope's Motion For Reconsideration on August 3, 1993. Ten days later, on August 13, 1993, Hope filed his notice of appeal from the district court's dismissal of his § 2255 petition and the district court's denial of his Motion For Reconsideration.

The district court clerk did not complete Form AO 450, entitled JUDGMENT IN A CIVIL CASE, as is the usual and prudent practice when disposing of civil claims, such as § 2255 petitions. However, the clerk completed a minute order form that is self-contained and complete, sets forth the relief to which the prevailing party is entitled, does not incorporate another document or other legal reasoning, and otherwise unambiguously communicates the district court's final disposition of the proceedings. This is what Rule 58 requires. *American Nat'l Bank & Trust v. Secretary of HUD*, 946 F.2d 1286, 1289 (7th Cir. 1991). The minute order box "[Other docket entry]" is checked, but this fact does not destroy the judgment's finality.[1]

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[1] As an aside we note that one reason for the Rule 58 requirement of a separate document "is to ensure that the parties and the appellate court can be certain about the proper timing of the appeal." *Smith v. Village of Maywood*, 970 F.2d 397, 400 (7th Cir. 1992). As will be seen, Hope overran the time for filing a notice of appeal from the district court's denial of his § 2255 petition, but there is no indication that the district court's use of an AO 450 form would have caused him to file a timely notice. In fact, Hope did not raise the Rule 58 separate document issue in his brief or argument.

We will accept the minute order form as the required separate document in this case, but we remind the clerks of the district courts that Form AO 450 is the preferred and sound vehicle for complying with Rule 58. Thus, the district court's dismissal of Hope's § 2255 petition became final and appealable on April 27, 1993.

Our jurisdiction to review the district court's dismissal of Hope's petition fails, however, because Hope did not file his notice of appeal within the time required by FEDERAL RULE OF APPELLATE PROCEDURE ("FED. R. APP. P.") 4. In a civil case against the United States, a party has sixty days to file its timely notice of appeal. FED. R. APP. P. 4(a)(1). A petition brought pursuant to 28 U.S.C. § 2255 by a federal prisoner constitutes a civil suit subject to this rule. FED. R. ON MOTION ATTACKING SENTENCE UNDER 28 U.S.C. § 2255 No. 11. Timely notice of appeal is mandatory and jurisdictional, meaning that "if an appellant does not file his notice of appeal on time, we cannot hear his appeal." *Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557, 1561 (7th Cir. 1990) (en banc). The district court entered its minute order signifying final judgment on April 27, 1993; William Hope filed his notice of appeal on August 13, 1993, more than 30 days after it was due.

Various post-judgment motions to the district court toll the time for filing a timely notice of appeal. FED. R. APP. P. 4(a)(4). Two such motions are motions to alter or amend the judgment under FED. R. CIV. P. 59, which must be filed within 10 days of the entry of judgment, and relief under FED. R. CIV. P. 60, if served within 10 days after the entry of judgment. FED. R. APP. P. 4(a)(4)(C) & (E). Hope apparently wished to move, under Rule 59(e), the district court to alter or amend its dismissal of his claim.[2] However, Hope did not file his mo-

[2] Hope styled his motion as a "Motion For Reconsideration," a motion that, strictly speaking, does not exist under the Federal Rules of Civil Procedure.

tion within 10 days of the district court's judgment. Instead, he filed motions on May 4 and May 21 to extend the time in which to file his generic Motion For Reconsideration. The district court granted both motions to extend time by issuing minute orders to that effect. Hope finally filed his Motion For Reconsideration on June 14, thirteen days before his notice of appeal was due.

Two principles of appellate practice are applicable to these facts. First, the district court may not extend the time within which a party may move to alter or amend a judgment under Rule 59(e). FED. R. CIV. P. 6(b), 59(e); *Bailey v. Sharp*, 782 F.2d 1366 (7th Cir. 1986). Second, a motion to alter or amend a judgment under Rule 59(e) that is filed more than 10 days after entry of judgment automatically becomes a Rule 60(b) motion. *United States v. Deutsch*, 981 F.2d 299, 301 (7th Cir. 1992). So, while Hope did not file a proper motion to alter or amend a judgment under Rule 59(e), he did file a proper motion under Rule 60(b). The district court had jurisdiction to hear his Motion For Reconsideration on this basis, but Hope's motion did not toll the time for filing a notice of appeal. Appellate Rule 4(a)(4) specifically states that a Rule 60(b) motion will not toll the time for filing notice of appeal unless it is filed within 10 days of judgment. FED. R. APP. P. 4(a)(4)(f). Therefore, because the time was not tolled, Hope's notice of appeal was late.

Hope argues that, by granting his motions to extend the time in which to file his Motion For Reconsideration, the district court led him to believe that his substantive motion tolled the time for filing his notice of appeal. This argument invokes the doctrine of "unique circumstances."

The doctrine of unique circumstances relieves a party from the consequences of filing a late notice of appeal where the district court has affirmatively assured the party that his motion has tolled the time for filing a notice of appeal. *Thompson v. Immigr. & Naturalization Serv.*, 375 U.S. 384, 387, 84 S.Ct. 397, 399 (1964). *Thompson* held that where a petitioner performed an act which, if

properly done, would have postponed the deadline for filing his appeal, and the district court concluded erroneously that the act had been properly done, the party may proceed as though the time for appeal has been postponed. *Id.* However, this is a narrow doctrine. The Supreme Court has interpreted *Thompson* to require a "specific assurance by a judicial officer" that the necessary act has been properly done. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179, 109 S.Ct. 987, 993 (1989). And we have interpreted *Osterneck* to require something more affirmative than a minute order granting a party's motion for extending the time to file a Rule 59 motion for unique circumstances to exist. *Green v. Bisby*, 869 F.2d 1070, 1072 (7th Cir. 1989).

The district court did nothing more than enter minute orders granting Hope's motions for extending the time in which to file his Motion For Reconsideration. Furthermore, Hope did not style his motions as calling for relief under Rule 59(e). In his motions to extend the time in which to file his substantive post-judgment motion, Hope referred to the forthcoming motion as a "Motion For Reconsideration." The district court judge may have assumed that Hope intended to move for relief under Rule 60(b) because Hope planned not to file his motion until after Rule 59(e)'s ten day limit. We will not allow Hope's ambiguity to extract from the district court an improper extension of time under the guise of unique circumstances. Therefore, we hold, consistent with *Green*, that the district court's minute orders granting Hope's pleas for extensions of time did not constitute the sort of specific assurances that might trigger the unique circumstances doctrine. These orders did not assure Hope that his time for appeal was tolled. They merely acknowledged that the court would consider Hope's Motion For Reconsideration in some vein even if Hope wanted to file it more than ten days after the court's judgment. Notably, the district court ultimately treated Hope's Motion For Reconsideration as a Rule 60(b) motion, indicating the court understood that the motion could not be treated as a Rule 59(e) motion. It is not the district court's duty, nor the U.S. Attorney's

duty,[3] to sort through post-judgment motions and advise the moving party whether his appeal clock remains ticking. So long as the district court granted Hope no specific assurance that his motion tolled the appeal clock, no unique circumstances existed and the appeal clock remained running.

We lack subject matter jurisdiction over the district court's dismissal, but we may review the district court's denial of Hope's Motion For Reconsideration. *Mares v. Busby*, 34 F.3d 533, 535 (7th Cir. 1994). We review the district court's judgment for abuse of discretion; such abuse exists "only in situations in which no reasonable person could agree with the district court." *Id.* (citations omitted).

The case that authorizes district courts to review late Rule 59(e) motions as Rule 60(b) motions elucidates that "substantive motions . . . must be shaped to the specific grounds for modification or reversal found in 60(b)—they cannot be general pleas for relief." *Deutsch*, 981 F.2d 299, 301 (citations omitted). Hope's Motion For Reconsideration was not shaped accordingly. He invoked his original § 2255 claims of constitutionally ineffective counsel, adding the twist that his counsel on direct appeal had a conflict of interest. He did not aver a cognizable ground for relief under Rule 60(b). In denying Hope's motion, the district court noted that Rule 9(b) of the Rules Governing § 2255 Proceedings allows dismissal of a successive motion that alleges no new or different grounds or alleges new grounds that the movant could have raised earlier. And Rule 60(b)(2) requires newly discovered evidence to reopen a judgment. The district judge quite reasonably concluded that Hope's Motion For Reconsideration offered nothing new. Hope alleged a new angle in his Motion For Reconsideration (his appeal lawyer's conflict of interest), but he could have raised this issue earlier. He did not present newly discov-

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[3] Hope also tries to obviate the consequences of his attorney's mistaken understanding of the law by blaming the government for not objecting to his motions to extend time.

ered evidence, and we find no other reason that would justify reopening Hope's sentence for further review. The district court did not abuse its discretion in denying Hope's Motion For Reconsideration in this matter. We AFFIRM.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA A07XXXC-92-001—Midwest Law Printing Co., Inc., Chicago—12-23-94

APPENDIX B

App. 8

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

February 15, 1995

Before

Hon. Harry W. Wellford, Circuit Judge*
Hon. Daniel A. Manion, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

WILLIAM HOPE,	) Appeal from the
	) United States
Petitioner-Appellant,	) District Court
	) for the Northern
No. 93-3207	) District of
	) Illinois, Eastern
vs.	) Division.
	)
UNITED STATES OF AMERICA,	) Nos. 92 C 6654
	) and 88 CR 298
	)
Respondent-Appellee.	) George M. Marovich, Judge.

O R D E R

On consideration of the petition

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* The Honorable Harry W. Wellford of the Sixth Circuit, sitting by designation.

for rehearing with suggestion for rehearing in banc filed in the above-captioned case, no judge in active service has requested a vote, and all of the judges on the original panel have voted to deny a rehearing.

IT IS HEREBY ORDERED that the petition for rehearing is hereby DENIED.

APPENDIX C

App. 10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
Eastern Division

JUDGMENT IN A CIVIL CASE

UNITED STATES OF AMERICA

V.

WILLIAM HOPE

Case Number: 92 C 6654 (88 CR 298)

o Jury verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

● Decision by Court. This action came to ~~trial or~~ hearing before the Court. The issues have been ~~tried or~~ heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED defendant's motion under 28 USC 2255 to vacate, set aside, or correct sentence is denied.

April 27, 1993 — *Date*

H. Stuart Cunningham — *Clerk*

[handwritten] Frances D'Andrea
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

92 C 6654

V.

Judge George M. Marovich

WILLIAM HOPE, No. 97710-024

Defendant.

MEMORANDUM OPINION AND ORDER

William Hope ("Hope") brought this action under 28 U.S.C. §2255 to vacate, set aside, or correct the sentence imposed by the United States District Court for the Northern District of Illinois, Eastern Division, on October 27, 1988, for unlawful possession of a firearm in violation of 18 U.S.C. §922 (g)(1). The United States of America

("Government") opposes Hope's petition and requests that it be dismissed without an evidentiary hearing. Hope maintains that he was denied effective assistance of counsel in the federal trial for firearms violations, in a state proceeding that resulted in a conviction used to enhance his federal sentence, and in the appeal of his federal conviction. Hope also alleges a denial of his due process rights during the state proceeding. For the reasons set forth below, we deny Hope's request for post-conviction relief. *[p. 2]*

FACTUAL BACKGROUND

On June 27, 1988, Hope was indicted for unlawful possession of a firearm that had previously traveled in interstate commerce, in violation of 18

U.S.C. §922(g)(1). Following a jury trial, Hope was convicted of that offense, and the government sought sentence enhancement under 18 U.S.C. §924(e) because Hope had three prior felony convictions. The district court denied Hope's Motion to Prevent the Government from Using Alleged Convictions to Enhance Sentencing. The court specifically found that Hope had been convicted of three prior felonies, and therefore the district court sentenced Hope to thirty years without parole.

Hope appealed his conviction on four grounds: (1) that police lacked probable cause to arrest him for the firearms violation; (2) the district court improperly admitted a stipulation

showing that he had previously been convicted of deviate sexual assault without a limiting instruction; (3) the evidence at trial was insufficient for a rational trier of fact to find him guilty beyond a reasonable doubt; and (4) he did not receive effective assistance of counsel at trial and during the sentencing hearing. The Seventh Circuit upheld Hope's conviction. United States v. Hope, 906 F.2d 254, 257-60 (7th Cir. 1990).

The Seventh Circuit also considered Hope's three challenges to the sentence enhancement. Id. at 260. Hope contended that: (1) one of the three felonies, a 1975 burglary of a commercial building, never resulted in a conviction; (2) commercial burglary should not be a

sentence-enhancing offense under 18 U.S.C. §924(e); *[p. 3]* and (3) the district court's failure to determine whether 1975 state proceedings actually resulted in a conviction contravened due process of law. Id. The Court of Appeals considered and rejected each of these challenges to the sentence enhancement. Id. at 260-63.

Hope brings the present action, asking this court to vacate, set aside, or correct the sentence imposed by the district court. Hope raises three principal arguments before this court: (1) his sentence was enhanced based upon a 1975 commercial burglary conviction that was obtained in violation of his rights to effective assistance of counsel and due process of law; (2) he

was denied effective assistance of trial counsel during proceedings in the district court; and (3) he was denied effective assistance of appellate counsel during proceedings before the Seventh Circuit.

DISCUSSION

A federal prisoner may obtain relief under 28 U.S.C. §2255 if his confinement is in violation of the Constitution or laws of the United States. Davis v. United States, 417 U.S. 333, 342-43 (1974). Section 2255 was intended to afford federal prisoners a remedy identical in scope to that available to state prisoners under 28 U.S.C. §2254. Id. at 343-44.

Hope first contends that his sentence was enhanced based upon an

invalid 1975 conviction in the Illinois Circuit Court for commercial burglary. Hope maintains that the 1975 conviction was invalid because it was obtained through violations of his rights to effective assistance of counsel and due process of law and that the *[p. 4]* plea he entered during that proceeding was involuntary and unknowing.

The issues contained in Hope's first principal argument were raised in Hope's Motion to Prevent Government from Using Alleged Prior Convictions To Enhance Sentencing which was presented to the district court prior to sentencing. The Seventh Circuit affirmed the district court's denial of Hope's motion, as well as, the use of the 1975 state conviction as a predicate

for sentence enhancement. Hope, 906 F.2d at 263. The Seventh Circuit specifically noted that in the district court Hope presented no evidence suggesting that he received ineffective assistance of counsel, that his 1975 plea was not knowing and voluntary, or that he was denied due process during the course of the 1975 proceeding. Id. Thus, the Seventh Circuit has decided the issues in Hope's first contention against him.

In considering a §2255 petition, a district court may not entertain issues decided adversely to the petitioner on direct appeal of his conviction unless the petitioner brings forward new facts or supports his assertions with an intervening change in the law. Page v.

United States, 884 F.2d 300, 302 (7th Cir. 1989); Norris v. United States, 687 F.2d 899, 900 (7th Cir. 1982). Hope's contentions here, alleging ineffective assistance of counsel, an unknowing and involuntary guilty plea, and denial of due process in connection with his 1975 conviction, were addressed by both the district court and the Court of Appeals. Since there has been no *[p. 5]* change in the law in this area, the petitioner must present new facts or evidence in order to prevail on his first argument.

Hope contends that his 1975 plea was not made knowingly and voluntarily and therefore in violation of his constitutional rights. In support of these contentions, Hope has attached four pieces of evidence to his §2255

petition: (1) a copy of the transcript of the 1975 proceedings that resulted in his state court conviction; (2) an affidavit of the Honorable Louis B. Garippo, presiding Judge during the 1975 proceedings in the Cook County Circuit Court; (3) Hope's own affidavit, stating that his attorney did not inform him of a critical detail[1] in the 1975 plea bargain; and (4) a letter from the Chief Records Officer of the Illinois Department of Corrections to Hope's current counsel. The letter indicates

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[1]Hope alleges that his counsel did not inform him that the entire agreement under which he was to undergo drug treatment at a facility called Gateway House in lieu of a three to nine year sentence, was subject to the approval of his parole officer. According to the record now before us, Hope's parole officer did not give his consent to the agreement, and Hope was returned to state custody to serve the suspended sentence imposed by Judge Garippo.

that the Illinois Department of Corrections has no record of Hope's 1975 conviction beyond his guilty plea and sentence to a drug abuse program.

However, for this court to consider new facts or evidence brought forth by the petitioner, the petitioner must first satisfy the cause-and-prejudice standard set forth in Keeney v. Tomayo-Reyes, 112 S. Ct. 1715, 1719 (1992). In Keeney, the Supreme Court reasoned that it was appropriate to apply the cause-and-prejudice *[p. 6]* standard to excuse a habeas petitioner's failure to develop a material fact at trial. Id. Under this standard, the petitioner is entitled to an evidentiary hearing if he can show cause for his failure to develop the facts at trial by producing

relevant evidence and actual prejudice resulting from that failure. Id. at 1721.

The petitioner's failure to produce relevant evidence at trial could be otherwise excused by showing that a fundamental miscarriage of justice would result from a failure to hold an evidentiary hearing. Id. The fundamental miscarriage of justice exception applies when a petitioner can establish his actual innocence under the probative evidence. Sawyer v. Whitley, 112 S. Ct. 2514, 2518 (1992). Petitioner has not alleged that exception here.

The Appellate Court opinion in this case indicates that the Seventh Circuit examined the transcript of the 1975

proceedings. Hope, 906 F.2d at 264. Nonetheless, the Appellate Court concluded that Hope's 1975 conviction did not contravene due process of law. Id. at 263. As the transcript pertains to the effectiveness of Hope's counsel at his trial and sentencing in the district court, the failure of Hope's counsel to present the transcript to the district court was also considered by the Court of Appeals. Id. at 264. The Court of Appeals concluded that the transcript is not materially inconsistent with the conviction. Id. Therefore, no prejudice could have resulted from any failure to present it. *[p. 7]* Since these issues have been directly decided by the Court of Appeals, we will consider the transcript

no further.

With regard to the remaining three pieces of new evidence, Hope's petition can be read to suggest two possible reasons for cause under Keeney: (1) that the evidence is newly discovered; or (2) that these pieces of evidence were not presented because of ineffective assistance provided by Hope's district court counsel.

When a petitioner presents new evidence in support of a request for post-conviction relief under §2255, he must show that he could not have produced the evidence at trial without due diligence. United States v. Hedman, 655 F.2d 813, 815 (7th Cir. 1981). The burden is even greater to the petitioner in that he must also show that if the

evidence had been presented at trial or sentencing, he could have obtained a different result. United States v. Scherer, 673 F.2d 176, 178 (7th Cir. 1982). Hope has made no such showing here with regard to the information contained in his affidavit, the Garippo affidavit, or in the letter from the Illinois Department of Corrections.

The affidavit of Judge Garippo can only be considered cumulative evidence because the judge merely summarizes what he said in the transcript. The transcript was determined to be "not materially inconsistent with the Certified Statement of Conviction," Hope, 906 F.2d at 243, which was considered by the district court. There could therefore have been no prejudice

from any failure to introduce Judge Garippo's affidavit. *[p. 8]*

Hope's self-serving affidavit states nothing that does not appear in the transcript, with the exception of Hope's statement as to what his counsel told him in the state proceedings sixteen years earlier. These assertions stand alone as the only evidence that Hope's counsel misrepresented the terms of the agreement to him. In light of the unlikelihood that a trier of fact would find that Hope's counsel did indeed misrepresent the terms of the agreement based upon Hope's affidavit, no prejudice is shown by counsel's failure to obtain that affidavit.

Hope also offers the ineffective assistance of counsel of attorney in the

district court counsel to support the "cause" requirement of Keeney. The effectiveness of Hope's counsel in the district court forms the basis of Hope's second principal argument.

Ineffective assistance of counsel may provide cause if the petitioner's counsel was indeed ineffective under the two-pronged test of Strickland v. Washington, 466 U.S. 668 (1984). United States v. Kovic, 830 F.2d 680, 684 n.9 (7th Cir. 1987) (citing Murray v. Carrier, 447 U.S. 478 (1986)). Under Strickland, there is a strong presumption that counsel's conduct falls within the reasonable standard. Strickland, 466 U.S. at 689. Ineffective assistance of counsel will be found when it is shown (1) that

counsel's performance was deficient; and (2) that the deficient performance caused the defendant prejudice. Id. at 687.

However, the issue of whether Hope's district court counsel provided him with constitutionally sufficient representation was decided squarely on appeal against Hope. Hope, 906 F.2d at 263-64. [p. 9] Since this issue was decided on direct appeal, it will not be reconsidered here. Page, 884 F.2d at 302; Norris, 687 F.2d at 900. Therefore, Hope fails to satisfy the "causel" requirement of Keeney.

The prejudice requirement of Keeney is also unsatisfied by the new facts and evidence presented by Hope. The letter from the Illinois Department of

Corrections is probative only on the issue of whether that department's records are current with respect to this individual. The letter does not state that there were no convictions entered against Hope. It is not persuasive on the issue of whether a conviction was indeed entered. No prejudice resulted from the failure of Hope's counsel to obtain such a letter and introduce it during Hope's federal sentencing.

Hope's third principal argument in this petition is that he was denied effective assistance of appellate counsel in the appeal of his federal firearms conviction. Hope specifically contends that his appellate counsel failed (1) to argue that the 1975 conviction was obtained in violation of

his rights to effective assistance of counsel and in violation of due process; (2) to present all relevant Illinois law in arguing whether the 1975 proceeding actually resulted in a conviction; and (3) to obtain an affidavit from Judge Garippo to use in the federal proceedings.

In order to maintain a claim for ineffective assistance of counsel, the petitioner must show that his counsel's performance was so deficient that the proper functioning of the adversarial process was undermined and the proceeding cannot be relied upon to have produced a just result. Strickland v. Washington, 466 U.S. *[p. 10]* 668, 686 (1984). The Strickland standard has been used as a basis for determining

whether a defendant was denied effective assistance of appellate counsel. Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1985). When a claim of ineffective assistance of appellate counsel is based upon a failure to raise viable issues, the court must examine whether counsel failed to raise significant and obvious issues on appeal. Id. Counsel need not raise every conceivable argument that is supported by the record. Evitts v. Lucy, 469 U.S. 387, 394 (1985). "[O]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Gray, 800 F.2d at 646.

Thus, under Strickland and Gray, a failure to raise viable issues would not

establish that appellate counsel's performance was deficient per se. A failure to raise viable issues would establish deficient performance only if the issues not raised were clearly stronger than those presented. Here, Hope attempts to establish ineffective assistance of appellate counsel by showing that appellate counsel failed to argue that the 1975 conviction was obtained in violation of his rights to due process and effective assistance of counsel. These issues are not clearly stronger than those presented by appellate counsel. In fact, the appellate court noted the lack of evidence available to support a claim of ineffective assistance or denial of due process. Hope, 906 F.2d at 263. The

opinion shows that these issues were addressed by the district court during sentencing and found to be without merit. Id. With regard to any failure of appellate counsel to raise these *[p. 11]* issues, Hope can show neither deficiency or prejudice to satisfy the Strickland test.

Hope also contends that appellate counsel failed to present all relevant Illinois law in deciding whether the 1975 proceeding actually resulted in a conviction. In support of this, Hope presented a list of Illinois cases discussing the state legislation used to send Hope to a drug treatment center in 1975. While the cases listed shed light on the history and purpose of the drug treatment program provided by the

Illinois Dangerous Drug Abuse Act, Ill. Rev. Stat. ch. 91 1/2, §120 (1973), they are not inconsistent with the appellate court's finding that the 1975 proceeding did result in a conviction. Again, Hope has not shown deficiency on the part of appellate counsel or any resulting prejudice.

Finally, Hope contends that his appellate counsel's assistance was deficient in that he failed to speak with Judge Garippo and that he failed to obtain an affidavit to present to the appellate court. As noted above, the affidavit from Judge Garippo that is attached to the petition now before us merely reflects Judge Garippo's statements in the transcript of the 1975 proceeding. That transcript was

determined by the appellate court to be "not materially inconsistent" with the Certified Statement of Conviction used as evidence in the district court to determine that the 1975 proceeding resulted in a conviction. Hope, 906 F.2d at 264. The affidavit would not have established anything not already contained in the transcript. *[p. 12]*

CONCLUSION

For the foregoing reasons, Hope's request for post-conviction relief is denied without hearing and his petition is dismissed.

ENTER:

[signature]
GEORGE M. MAROVICH
UNITED STATES DISTRICT JUDGE

DATED: April 27, 1993

APPENDIX D

App. 36

[Order of U.S. District Court dated August 3, 1993, denying reconsideration of order of April 27, 1993 denying relief under 28 U.S.C. §2255]

ORDER

Before us is Petitioner William Hope's motion to reconsider our order which denied his request for relief under §2255. Hope has already exercised a number of appeals and other post-conviction relief avenues and he now asks this court to reconsider our denied of his §2255. Because we find that Hope does not present any new arguments or evidence to this court, we find that his assertions at this stage are merely the same contentions phrased differently and we deny his motion to reconsider.

Hope has already exercised his post-trial motions after his federal

trial, his Seventh Circuit appeal, his Motion for Reconsideration en banc, a Petition for Writ of Certiorari to the United States Supreme Court, a Motion for Reconsideration of Denial of Certiorari, post-conviction proceedings in state court, a §2255 petition and an appeal to the Appellate Court of Illinois, First Judicial District, Fifth Division which is still pending. Aside from a number of arguments which he already raised in his §2255 petition, he asserts that his appellate counsel could not have been effective because he was also sentencing counsel and therefore he could not have pointed out his own deficiencies to the reviewing court.

Hope has already raised the following questions of assistance of

counsel: whether he received effective assistance of counsel in prior state proceedings; whether he received effective assistance of counsel in his federal firearms trial; and whether he received effective assistance of counsel in his appeal of his federal conviction.

Federal Rule 60(a) or (b) requires relief from a judgment based upon such grounds as clerical mistakes and newly discovered evidence. Rule 9(b) of the Rules Governing §2255 Proceedings provides that "a second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, or, if new and different grounds are allege, the judge finds that the failure

of the movant to assert those grounds in a prior motion constitutes an abuse of the procedure governed by these rules." 28 U.S.C. §2255, Rule 9(b) (1988).

We find that Hope raises no new arguments that we have not already addressed. Although this new attack on ineffective assistance of counsel is presented in a novel fashion, it dies not offer us any new evidence or insight into this matter which would change our earlier ruling. We deny the motion to reconsider.

(Signed:) George M. Marovich, Judge